

DOCKET FILE COPY ORIGINAL

RECEIVED

MAR 29 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of :

Implementation of Section 4(g) of the: :
Cable Television Consumer Protection :
Act of 1992 :

Home Shopping Station Issues. :

MM Docket No. 93-8

COMMENTS OF
NATIONAL INFOMERICAL MARKETING ASSOCIATION

Jeffrey D. Knowles
John F. Cooney
Venable, Baetjer,
Howard & Civiletti
1201 New York Avenue, N.W.
Washington, D.C. 20005
(202) 962-4800

Its Counsel

March 29, 1993

No. of Copies rec'd
List A B C D E

079

SUMMARY OF ARGUMENT

The Commission, upon analyzing the statutory factors

station basis, through the license renewal process, as required by the Communications Act.

Accordingly, the Commission should reaffirm its prior findings and reject proposals to carve out a sectoral exception to its long-established and well-justified policy of not making license decisions based on format considerations.

2.) In the Commercialization portion of its 1984 Television Deregulation decision, 98 F.C.C.2d 1076, 1101 (1984), the Commission eliminated its prior limitations on the amount of commercial programming television broadcasters could carry. The Commission based its decision on evidence that viewer preferences and market forces would determine the amount of commercial programming that was appropriate and that direct viewer control of programming content, through its program selection decisions, was preferable to government regulation. Developments in the last nine years have confirmed the Commission's decision. The proliferation of programming alternatives available to viewers has continued since 1984. The number of choices will grow at an increasing rate in the future, due to technological advances. These developments strongly counsel against the proposed return to category-based, quantitative restrictions on the amount of commercial matter.

Further, broadcasters have taken advantage of the flexibility afforded by elimination of prior restrictions to develop new types of commercial programs that were not envisioned in 1984. These developments include the rapid development of a vigorous infomercial industry. The strong evidence of consumer interest in program-length commercials aired on broadcast stations confirms the Commission's judgment to permit programming experimentation to better serve viewers' interests.

Accordingly, in resolving this rulemaking, the Commission should reaffirm the findings underlying the 1984 Commercialization decision in light of the evidence of consumer preference for new and expanded commercial programming manifested over the last nine years.

TABLE OF CONTENTS

DISCUSSION	- 4 -
I. PUBLIC ACCEPTANCE OF PROGRAM-LENGTH COMMERCIALS.	- 5 -
II. COMPETING DEMANDS FOR THE BROADCAST SPECTRUM.	- 7 -
III. COMPETITION BETWEEN BROADCAST AND CABLE SOURCES.	- 12 -
CONCLUSION	- 14 -

RECEIVED

MAR 29 1993

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of :

Implementation of Section 4(g) of the: :

MM Docket No. 93-8

fully informed about the commercial nature and sponsor of program-length commercials.¹

A program-length commercial is a paid advertisement for a product or service, typically 30 minutes in duration, that incorporates traditional programming elements into its body, in order to better educate, inform and entertain viewers. Program-length commercials are shown extensively by both broadcast stations and cable channels. Major corporations, such as Eastman Kodak, General Motors, American Airlines, Avon, Braun, Bissell, GTE, Time-Life, Volkswagen, Hyatt Resorts and Visa now use infomercials as part of their marketing effort.

The infomercial industry has developed in response to the Commission's 1984 Commercialization decision, which expressly removed prior policy restrictions on program-length commercials. Television Deregulation, 98 F.C.C.2d 1076, 1102. The industry has grown from product sales of \$10 million in 1984 to over \$750 million in 1992.

Program-length commercials provide a valuable income stream to support the operations of broadcast stations, especially independent stations. They thereby contribute to the preservation of "free", over-the-air television. According to a November 1992 survey by BJK&E Media Group,

¹In addition, these programs are governed by Section 73.1212 of the Commission's Rules concerning sponsorship identification.

91% of the 709 stations that responded to the survey stated that they show infomercials.

NIMA and its members oppose efforts to modify the 1984 Commercialization decision in a manner that would restrict the airing of program-length commercials on broadcast stations or that would inhibit the future development of this valuable form of consumer education.² Nothing about the airing of infomercials diminishes in any respect the obligation of a broadcast licensee to provide local programming that responds to local needs. Similarly, nothing about program-length commercials affects the Commission's ability fully to enforce the station's community broadcasting and other requirements at renewal time.³ The showing of infomercials on broadcast stations thus differs significantly from concerns about the kind of around-the-clock adherence to a home shopping format that appears to underlie Section 4(g).

²NIMA's interest is triggered by the portion of the NPRM that includes within the scope of the inquiry "stations that are predominantly utilized for the transmission of sales presentations or program-length commercials." NPRM, 8 F.C.C. 2d at 660 (emphasis added).

³For example, these other requirements include children's programming obligations.

DISCUSSION

NIMA's comments will address the three mandatory criteria the Commission is required to address by Section 4(g): the extent to which viewers watch home shopping stations; the level of competing demands for the broadcast spectrum; and the extent of competition between home shopping stations and nonbroadcast services offering similar programming. NIMA believes that the experience of its members in the program-length commercial industry will assist the Commission in evaluating these criteria and determining whether further Commission action is necessary.

It is NIMA's conclusion that none of these factors provides a justification for departing from the Commission's longstanding and consistent view, grounded in the First Amendment, that licensing decisions should not be based on a station's programming format. See FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981). As long as a licensee fulfills the Commission's requirement to respond to the needs of the local community, the format the station follows, and the amount of commercial programming it carries, should continue to be governed by market forces.⁴

⁴If the Commission follows our approach and determines that it should not establish sector specific rules for stations that follow a home shopping format, it need not resolve the initial issue set forth in the NPRM, namely, how to define the types of stations that would be subject to sector specific limitations.

No reason has been shown why the Commission should jettison this carefully considered, and judicially approved, approach in favor of selective, sectoral regulation based on the content of the licensee's speech. See Office of Communications of the United Church of Christ v. FCC, 707 F.2d 1413, 1426-31 (D.C. Cir. 1983); Action for Children's Television v. FCC, 821 F.2d 741, 748-49 (D.C. Cir. 1987). Any concerns with an alleged failure by particular home shopping stations to meet their public interest obligations can, and should, be resolved on a station-by-station basis at renewal time.

The Commission, in resolving this proceeding, should reaffirm the findings underlying the Commercialization decision. That decision has been proved to be fully justified by the rapid evolution of the broadcast industry in the direction anticipated in 1984 and by the development of new forms of video advertising that respond to consumer interests.

I. PUBLIC ACCEPTANCE OF PROGRAM-LENGTH COMMERCIALS.

The public has responded favorably to the introduction of program-length commercials on broadcast stations. Since their introduction in 1984, the product revenues generated by program-length commercials have grown by over 7500%. NIMA estimates that at least one-half of this sales volume

is attributable to infomercials carried by broadcast stations.

Program-length commercials have proved to be an effective and popular form of advertising. Information collected by J. Walter Thompson suggests that during any one day, 3.5 million households tune into an infomercial program for a minimum of 30 minutes. A research survey conducted by Hudson Street Partners in August 1992 found that 55% of the people surveyed had watched a program-length commercial in the last year. Further, individual programs have proved effective in attracting viewer interest. For example, the Victoria Jackson infomercial has prompted purchases by approximately 750,000 viewers, one-half of whom are repeat buyers. This program-length commercial is estimated to have generated sales in excess of \$150 million over the last two

difficult. Sufficient information often cannot be conveyed in a 30-second "institutional" or a 10-second "sound bite".

These factors demonstrate that the Commission was correct in 1984, when it determined that elimination of the Commercialization guidelines would "promote licensee experimentation and otherwise increase commercial flexibility." Television Deregulation, 98 F.C.C.2d at 1105. Since that time, the program-length commercial has developed to satisfy a previously unanticipated consumer desire for longer commercial segments that provide in-depth knowledge about specific products and issues.

II. COMPETING DEMANDS FOR THE BROADCAST SPECTRUM.

976-77. Due to the important First Amendment implications of this policy and the anti-censorship requirements of Section 326 of the Act, advocates of changing existing policy bear a heavy burden to demonstrate why the current regulatory structure should be changed in such a fundamental fashion.

For many years prior to its Television Deregulation decision, the Commission had maintained a policy that broadcasters must carry programs responsive to the needs and issues of importance to the local community of license. National Black Media Coalition v. FCC, 589 F.2d 578 (D.C. Cir. 1978). This obligation has always been enforced primarily through an individualized review of station performance at the time of license renewal.

The 1984 decision modified one relevant aspect of prior Commission policy. The Commission eliminated specific programming guidelines, including those related to the quantity of commercial programming. It concluded that the amount of commercial programming carried by a station would not, in and of itself, preclude a finding that the licensee was acting in the public interest. But the Commission explicitly maintained the requirement that the licensee must "provide programming responsive to issues of concern to its community of license." Television Deregulation, 98 F.C.C.2d at 1091. That obligation remains fully enforceable through the license renewal process.

Under this policy, the Commission does not inquire into the specific format followed by the station. The Commission has rejected such an approach for compelling reasons, because basing licensing decisions on the content of the speech carried by the station would raise significant First Amendment concerns and could violate Section 326 of the Act. National Black Media Coalition, 589 F.2d at 580-81.

As demonstrated by the congressional hearings that led to adoption of Section 4(g), those who advocate restrictions on home shopping stations essentially disagree with the manner in which the Commission previously applied its existing policies at renewal time in individual proceedings involving some stations that rigidly follow this format.⁵ Contrary to the Commission's decisions, the proponents would have denied license renewal on the ground that these stations did not devote sufficient time or efforts to local programming needs. The proponents escalated their disagreement over these individual licensing decisions to Congress, which in turn required the Commission to focus on this programming format in a review of its longstanding method of accommodating the public interest with the First Amendment rights of the broadcaster.

⁵See Broadcasters' Public Interest Obligations and S. 217, the Fairness in Broadcasting Act of 1991, Hearing before the Subcommittee on Communications of the Senate Commerce, Science and Transportation Committee, S. Hrg. 102-352, 102nd Cong., 1st Sess. (June 20, 1991) at 50-55 (Angela Campbell), 67-72 (Andy Schwartzman).

The proponents of special restrictions for home shopping stations note, correctly, that Supreme Court decisions provide somewhat less protection under the First Amendment to commercial speech than to political speech. From this starting point, the proponents invite the Commission to make public interest determinations based on the amount of commercial speech carried by a station.

The Commission should reject the invitation to start down this slippery slope. Such an approach inevitably would require reimposition of the "category-based, quantitative

which "'primarily present[t] coverage of and commentary on, current events.'"6

The Court found that the basis for the regulation was the difference in content between ordinary newspapers and commercial publications. It expressly rejected "the city's naked assertion that commercial speech has 'low value'", as a justification for this discrimination:

[T]he city's argument attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimates the value of commercial speech.

The decision in Discovery Network, therefore, completely undermines the intellectual underpinnings of the argument made in the Congressional hearings in favor of restrictive regulation of broadcast programming based on commercial-versus-noncommercial format considerations.

In sum, if there is a concern that particular stations are carrying so much advertising that they no longer fulfill their local community programming obligation, then that question can and should be fully addressed in the context of individual license renewal proceedings, rather than through discriminatory treatment of a segment of the broadcast community based on the content of its speech.

⁶ In determining whether broadcasting a significant amount of commercial programming is in the public interest, footnote 16 of the Court's decision is relevant. It notes that "some ordinary newspapers" -- the paradigm of speech entitled to First Amendment protection -- "try to maintain a ratio of 70% advertising to 30% editorial content."

III. COMPETITION BETWEEN BROADCAST AND CABLE SOURCES.

There is no precedent for the Commission's distinguishing between the obligations of various stations based on whether one licensee faces competition from non-broadcast sources. The Commission should reject the request to create such an exception at this time, particularly when the programming choices available to viewers are proliferating from both broadcast and non-broadcast sources.

The Commission has never attempted to equalize competition among stations based on their format. Nor has it ever tried to handicap the competition between broadcast stations and cable. Indeed, the Commission has adopted a policy of promoting programming diversity from a variety of sources. Malrite TV v. FCC, 652 F.2d 1140 (2d Cir. 1981), cert. denied sub nom. National Football League v. FCC, 454 U.S. 1143, 1149-50 (1982). If the Commission attempted to include as a regulatory criterion whether a broadcaster faces competition in programming from non-broadcast sources, it necessarily would be forced to make de facto determinations about the types of programming viewers should be able to see on broadcast stations. The Commission would have to classify stations according to format and

differentiate among them on that basis, a step the Commission wisely has been unwilling to take.⁷

There is no justification for such a major reorientation of the Commission's approach to broadcast regulation at this time. The 1984 Commercialization decision was based on evidence that programming choices available to viewers were likely to flourish.

The significance of our new regulatory scheme lies not only in its impact on the programming behavior of licensees in today's video marketplace, but also in its flexibility in accommodating the

Further, the Commercialization decision was based on the understanding that consumers could better determine how much commercial programming was in their interest by a decisive yet finely tuned action -- dialing away from shows or stations that showed commercial programming in which they are uninterested. This aspect of the Commission's decision also has been proved correct by the intense competition

validity of the Commercialization decision, in light of the substantial additional evidence now available to confirm the validity of those findings.

Respectfully submitted,

NATIONAL INFOMERCIAL MARKETING
ASSOCIATION

By: Jeffrey D. Knowles (J.D.)
Jeffrey D. Knowles
John P. Cooney
Venable, Baetjer, Howard &
Civiletti
1201 New York Avenue, N.W.
Washington, D.C. 20005
(202) 962-4800

Its Counsel

March 29, 1993